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No. 97-2028

# In the Supreme Court of the United States

OCTOBER TERM, 1997

TRAVELERS INDEMNITY COMPANY OF ILLINOIS,
PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)) applies to a decision of the United States Army Corps of Engineers to await the results of a technological study before raising the height of a breakwater.

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### OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court (Pet. App. 19a-27a) is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 17, 1997. A petition for rehearing was denied on March 19, 1998. Pet. App. 28a. The petition for a writ of certiorari was filed on June 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1950, Congress authorized the expansion and improvement of an existing breakwater at what is now known as King Harbor in Redondo Beach, California. River and Harbor Act of 1950, ch. 516, § 101, 64 Stat. 166. The United States Army Corps of Engineers (Corps) prepared a detailed plan for the breakwater improvement, indicating that the breakwater's crest should be raised to 14 feet above a specified water level. Pet. App. 20a. The project was completed in 1958. *Id.* at 21a. Because the breakwater was not as effective in aiding navigation as had been hoped, however, the Corps undertook a second project, completed in 1964, to raise parts of the breakwater from 14 to 22 feet over the specified water level. *Ibid.*

In 1980 and 1983, storms caused significant damage at King Harbor. Pet. App. 5a. As a result, the Corps began studying the possibility of increasing the remaining 14 foot portions of the breakwater to 22 feet. *Ibid.* During this period, the Corps discovered that, as a result of subsidence, some breakwater sections were only 12 feet high and not 14 feet as intended. *Ibid.* The Corps thus needed to choose whether and how to proceed with future breakwater construction. It decided not to return the relevant portions of the breakwater to a height of 14 feet—a task that, in itself, would have been a "major, not a trivial, engineering project" (*id.* at 6a)—but to continue the ongoing study for raising the breakwater to 22 feet. *Ibid.* In other words, the Corps elected to "put off the smaller improvement * * * while it studied a much larger improvement." *Id.* at 9a.

In 1988, an extraordinary storm—"the kind that hits Redondo Beach only once every sixty or seventy

years" (Pet. App. 6a)—caused substantial damage to several business establishments built on erected mounds of land ("moles") in the interior of the harbor. The damaged establishments included the Portofino Inn and Reuben's Restaurant. *Id.* at 6a, 20a, 24a.

2. This lawsuit was filed by petitioner, an insurance company, against the United States for damages sustained by the Portofino Inn. The suit was brought under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 2671 *et seq.* The Act provides that, as a general matter, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. 2674. The Act's "discretionary function exception," however, preserves the United States' immunity from suit for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The district court entered judgment in favor of petitioner, finding, among other things, that the Corps had acted negligently in its handling of the breakwater (Pet. App. 23a-24a), and that the discretionary function exception was inapplicable (*id.* at 26a).

After the district court issued that ruling, the court of appeals decided a parallel case involving claims against the United States for damage to Reuben's Restaurant during the same storm. *National Union Fire Ins.* v. *United States*, 115 F.3d 1415 (9th Cir. 1997) (reprinted at Pet. App. 3a-18a), cert. denied, 118 S. Ct. 1053 (1998). In that case, the Ninth Circuit held that the discretionary function exception

does preserve the United States' immunity from suit for the matters at issue here. The court held that "[t]he Corps had statutory discretion," that "there was no regulation or policy requiring the Corps to monitor the breakwater height," that the Corps' judgments concerning the breakwater were "based on considerations of public policy," and that "where a statute or policy plainly requires the government to balance expense against other desiderata, then considering the cost of greater safety is a discretionary function." Pet. App. 16a-17a. This Court denied certiorari. 118 S. Ct. 1053 (1998).

On November 20, 1997, in an unpublished memorandum decision, the court of appeals reversed the district court's decision in the present case in light of its earlier holding in *National Union*. Pet. App. 1a-2a.

## ARGUMENT

This Court recently denied certiorari in *National Union*, 118 S. Ct. 1053 (1998), a case arising from the same underlying facts as this one and involving issues substantially identical to those presented here. The court of appeals' factbound ruling in this case is no more worthy of this Court's review.

The governmental actions in question were fundamentally discretionary in character. The Corps decided that it would be inappropriate to deal with the problem of subsidence by engaging in costly efforts to add two feet to the relevant portions of the breakwater. Instead, balancing several statutory factors (see Pet. App. 9a-10a), the Corps elected to deal with the subsidence problem as part of a larger construction effort to make much more substantial improvements to the breakwater as a whole. *Id.* at 15a. As

the court of appeals held in *National Union*, that exercise of discretion is precisely the kind of governmental judgment that the discretionary function exception protects from judicial second-guessing. *Id.* at 15a-17a.

Petitioner nonetheless contends (Pet. 11-12) that the Corps' decision here should be characterized as an "operational decision" rather than a "planning-level decision," and suggests that only "planning-level decisions" fall within the scope of the discretionary function exception. Whether or not petitioner's characterization of this particular decision is correct,[1] petitioner's proposed distinction between "operational" and "planning-level" decisions is without merit. As this Court has repeatedly emphasized, "[d]iscretionary conduct is not confined to the * * * planning level," and the discretionary function exception "reach[es] decisions made at the operational or management level" as well. *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991) (distinguishing *Dalehite* v. *United States*, 346 U.S. 15 (1953)); see also *United States* v. *Varig Airlines*, 467 U.S. 797 (1984). There is also no merit to petitioner's contention (Pet. 10-13) that the decision below conflicts with other decisions of the same court of appeals. This Court does not grant certiorari to resolve claims of intracircuit conflicts, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, the court of appeals

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[1] Petitioner's characterization of the decision as "operational" rests on the premise that the Corps had a policy requiring it to monitor the breakwater height and assure that it continued to conform to its design specifications. See Pet. 13. But the court of appeals found to the contrary in *National Union*, Pet. App. 16a, and petitioner's disagreement with that finding of fact does not warrant further review.

correctly determined that the decision below is fully consistent with other Ninth Circuit precedent. Pet. App. 15a-17a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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